

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ALEXIS DEVON SMITH,

Petitioner,

Case No. 1:05-cv-548

v

HON. JANET T. NEFF

BLAINE LAFLER,

Respondent.

FINAL ORDER

This is a habeas corpus petition filed pursuant to 28 U.S.C. § 2254. The matter was referred to the Magistrate Judge, who issued a Report and Recommendation, recommending that this Court deny the petition. The matter is presently before the Court on Petitioner's objections to the Report and Recommendation. In accordance with 28 U.S.C. § 636(b)(1) and FED. R. CIV. P. 72(b)(3), the Court has performed de novo consideration of those portions of the Report and Recommendation to which objections have been made. The Court denies the objections and issues this Judgment pursuant to FED. R. CIV. P. 58.

Petitioner presents five objections to the Magistrate Judge's Report and Recommendation. First, Petitioner argues that the Magistrate Judge erred in concluding that the jury instructions given by the trial court regarding felony murder were acceptable. Petitioner's argument is without merit. The Magistrate Judge correctly reasoned that there are three alternative states of mind that constitute the malice requirement of felony murder. Based upon the facts presented at trial, the trial court correctly relied upon the third mental state, "intent to create a very high risk of death or great bodily

harm with knowledge that death or great bodily harm would be the probable result.” *See People v. Smith*, 733 N.W.2d 351, 365 (Mich. 2007).

Petitioner also argues that the Magistrate Judge incorrectly determined that the trial court was not obligated to instruct the jury regarding aiding and abetting. The Magistrate Judge correctly concluded that Petitioner was not charged with or convicted of first-degree murder under an aiding and abetting theory, and the trial court was therefore not required to instruct the jury on aiding and abetting.

Third, Petitioner argues that the trial judge shifted the burden of proof when posing questions to the jury during voir dire. The Magistrate Judge correctly determined that even if the trial judge’s questions implied that Petitioner was guilty, it was a brief inquiry, and the jury was given the proper final jury instructions.

Fourth, Petitioner argues that the Magistrate Judge erred in determining that the jury instructions regarding unanimity were acceptable. Petitioner specifically states that the trial court failed to instruct the jurors that their decision must be unanimous as to each offense. The Magistrate Judge correctly concluded that the trial court gave the standard unanimity jury instruction without objection or request for a special instruction.

Finally, Petitioner argues that the Magistrate Judge erroneously concluded that his claims for ineffective assistance of appellate counsel and cumulative error had no merit. Petitioner’s objection demonstrates his disagreement with the Magistrate Judge’s conclusions, but Petitioner’s analysis does not reveal any factual or legal error by the Magistrate Judge.

Having so determined, the Court must further determine pursuant to 28 U.S.C. § 2253(c) whether to grant a certificate of appealability as to the issues raised. The Court must review the

issues individually. *Slack v. McDaniel*, 529 U.S. 473 (2000); *Murphy v. Ohio*, 263 F.3d 466, 466-67 (6th Cir. 2001).

“Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court’s assessment of the constitutional claims debatable or wrong.” *Slack*, 529 U.S. at 484. Upon review, this Court finds that reasonable jurists would not find the Court’s assessment of Petitioner’s claims debatable or wrong. A certificate of appealability will therefore be denied.

THEREFORE, IT IS ORDERED that the objections (Dkt 41) are DENIED and the Report and Recommendation of the Magistrate Judge (Dkt 40) is APPROVED and ADOPTED as the opinion of the Court.

IT IS FURTHER ORDERED that the petition for habeas corpus relief (Dkt 1) is DENIED for the reasons stated in the Report and Recommendation.

IT IS FURTHER ORDERED that a certificate of appealability pursuant to 28 U.S.C. § 2253(c) is DENIED as to each issue asserted.

Date: September 30, 2008

/s/ Janet T. Neff
JANET T. NEFF
United States District Judge